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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

Nos. 480-487

Robert Murdock, Jr., Anna Perisich, Willard L. Mowder, Charles Seders, Robert Lamborn, Anthony Maltezos, Anastasia Tzanes, and Ellaine Tzanes,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA
(City of Jeannette)
Respondent

Petition for Writs of Certiorari to the Superior Court of Pennsylvania

HAYDEN C. COVINGTON
Attorney for Petitioners

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Petition for Writs of Certiorari to the Superior Court of Pennsylvania

To the Supreme Court of the United States:

The above named petitioners present this their petition for writs of certiorari and show upto the Supreme Court of the United States as follows:

A

Summary Statement of Matters Involved

1. *Preliminary Statement.*

The ordinance involved here is the identical ordinance questioned in Douglas et al., *Petitioners*, v. Jeannette et al., No. 450, October Term 1942, certiorari to the United States Third Circuit Court of Appeals. The facts in this case are

identical to the facts in that case. Except as to question No. 3 of the questions to be relied upon (page 3, infra), the questions here presented are the same as questions presented in the *Douglas* case. The difference is that the opinions and decrees are by different courts and question three is new and different; see footnote 4, page 13, infra. The opinion of the Superior Court construing the ordinance in this case will, however, throw considerable light upon the issues presented in the *Douglas* case. The case at bar is not controlled by this court's decision in the case of *Jone* v. *Opelika*, 316 U. S. . . ., 62 S. Ct. 1231. The distinction is that petitioners here claim that the license taxes imposed are *excessive* and a "substantial clog" on the freedoms of speech, press and worship. The issues here presented are not foreclosed by this Court's holding in that case, because here is involved a new question of discrimination. This case presents an opportunity for this court to explain what is meant by the term "substantial clog". The term therefore requires definition. This new term can be applied here because all facts that the Court would want to know in applying the new term are fully presented in the record.

2. *Statutory Provision Sustaining Jurisdiction.*

Section 237 (b) of the Judicial Code [28 U. S. C. A. 344 (b)] sustains jurisdiction of this Court.

3. *Validity of the City Ordinance Drawn in Question.*

The legislation here drawn in question is ordinance number 60 of the City of Jeannette, Pennsylvania, which reads as follows, to wit:

"City of Jeannette, Pa.
Ordinance No. 60

An Ordinance regulating the canvassing for or soliciting of orders for goods, paintings, pictures,

wares or merchandise of any kind within the Borough of Jeannette, and the delivery of such articles under orders so obtained or solicited and requiring all person or persons so engaged in canvassing, soliciting or delivering, to first procure from the Burgess a license to transact said business, and also regulating the hawking, vending of fruits and other merchandise upon the streets by public outcry or by solicitation and requiring all person or persons thus engaged to first obtain a license from the Burgess.

Be It Ordained and enacted by the Borough of Jeannette in Council assembled and it is hereby ordained and enacted by the authority of the same.

Section I.* That all persons canvassing for or soliciting within said Borough, orders for goods, paintings, pictures, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the Burgess a license to transact such business and shall pay to the Treasurer of said Borough therefor the following sums according to the time for which said license shall be granted.

For One day $1.50, for One week seven $7.00 dollars, for two weeks twelve $12.00 dollars, for three weeks twenty $20.00 Dollars, provided that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers doing business in said Borough of Jeannette.

Section II. That all persons huckstering, peddling, or selling fruits, goods or other merchandise upon the streets of said Borough by outcry or solicitation of the

* Section *one* of the ordinance providing for payment of a tax of $1.50 per day applies only to *canvassing and soliciting* of orders or delivering under orders and does not apply to *peddling or huckstering*. It is not contended that petitioners solicited *orders*. They were prosecuted for peddling and huckstering without payment of the $10 daily license. See record in *Stewart* v. *Jeannette*, 309 U. S. 674, 699, No. 722, October Term 1939, certiorari denied.

people upon the streets or thoroughfares of said Borough shall be required to procure from the Burgess a license to transact said business and shall pay to the Treasurer of said Borough therefore, the sum of ten $10.00 Dollars per day. Any person or persons failing to obtain a license as required by this ordinance shall, upon conviction before the Burgess or Justice of the Peace of said Borough forfeit and pay a fine not exceeding one hundred $100.00 Dollars, nor less than the amount required for the license for such person or persons together with the costs of suit, and in default of payment thereof, the defendant or defendants may be sentenced and committed to the Borough lock-up for a period not exceeding five (5) days or to the County Jail for a period not exceeding thirty (30) days.

Adopted by the Town Council of the Borough of Jeannette this first day of March, A.D. 1898.

D. E. Carle, President of Council.

Attest: Geo. S. Kirk, Secretary.

I, J. Claire Manson, City Clerk, of the City of Jeannette, Pennsylvania, hereby certify that the foregoing is a true and correct copy of Ordinance No. 60 of the Borough of Jeannette (now the City of Jeannette), Pennsylvania.

J. Claire Manson, City Clerk."

[Seal]

R. 8a, 20a.

4. *Date of Judgment and Orders to be Reviewed.*

The decrees or judgments of the Pennsylvania Superior Court were rendered and entered on July 23, 1942, in causes numbers 1 to 8, inclusive, on docket of said court. (R. 122-5) Within the time required by law petitions for leave to appeal from said judgments to the Pennsylvania Supreme Court were duly filed and allocatur refused by that court September 28, 1942. (R. 126-134; 134-135) Time for filing pe-

tition for writs of certiorari in this court expires on December 28, 1942. This petition is filed within that time.

5. *Time and Manner in which Questions Raised Below.*

In the Mayor's Court at the close of the Commonwealth's case and at the close of the entire case petitioners duly filed their motion to dismiss on the ground, among other things, that the ordinance as applied deprived them of their rights of freedoms of press, speech and worship of Almighty God, contrary to the United States Constitution. (R. 59a-60a; 106a) On February 26, 1940, said motions were overruled, petitioners adjudged guilty and fined $50 each or in default thereof to spend 30 days in the Westmoreland County Prison. (R. 60a; 107a) On March 1, 1940, petitioners by written petition for appeal to the Court of Quarter Sessions Court of Westmoreland County complained of the judgment against them under the ordinance because as applied it abridged their rights of freedoms of speech, press and of worship, contrary to the Fourteenth Amendment to the United States Constitution. (R. 6a; 18a) The petitions duly filed were continued indefinitely from term to term by the judge of the Court of Quarter Sessions of Westmoreland County. The Quarter Sessions Court, on February 20, 1942, found that the appeals involved the constitutionality of the ordinance, and denied the appeals because the questions raised were no longer disputable on authority of *Stewart* v. *Commonwealth*, 309 U. S. 674, and *Pittsburgh* v. *Ruffner*, 134 Pa. S. C. 192. (R. 110a; 111a) Appeals were duly taken to the Superior Court from the orders refusing said appeals. By assignments of error petitioners complained of the ordinance on the grounds that it abridged said freedoms contrary to the Federal Constitution. (R. 113-4) Within ten days from date of the decrees entered by the Superior Court each petitioner filed his petition for appeal to the Supreme Court, complaining of the ordinance on the grounds that it provided for excessive tax and; as applied, abridged freedoms of

speech, press and worship of Almighty God, contrary to the Federal Constitution. (R. 126-34) Each of the courts below held that the federal questions were properly raised and that the ordinance was constitutional and that petitioners had not been denied any federal rights.

6. *Opinions of the Courts Below.*

The opinions of the Mayor's Court and Court of Quarter Sessions were not reported, but appear in the record. (R. 107a; 109a-111a) The opinion of the Superior Court is not officially reported, but is unofficially reported in 27 A. 2d 667, and appears in the record at pages 115 to 122, inclusive. Previous opinion of the Superior Court relating to similar ordinances as applied to Jehovah's witnesses is *Commonwealth* v. *Reid*, 144 Pa. S. C. 569, 20 A. 2d 841. See *Pittsburgh* v. *Ruffner*, 134 Pa. S. C. 192, 4 A. 2d 224.[1]

7. *Statement of Facts.*[2]

The occupation of each petitioner is ordained minister of Jehovah God, representing the Watch Tower Bible & Tract Society, a Pennsylvania corporation, and, as such representative, certified by said Society to be one of Jehovah's witnesses preaching the gospel of God's kingdom, The Theocracy. A sample of the credential of ordination carried by each appellant was received in evidence. (R. 77a) As such ordained ministers, appellants called from house to house presenting to the people the gospel in printed form. In this they acted exactly as did the Lord Jesus Christ and His apostles, who taught publicly and from house to house.—Luke 8:1; 13:26; Acts 5:42; Acts 20:20; 1 Peter 2:9, 21.

[1] Relied on in this case by Superior Court as authority, involves a permit ordinance identical with the ordinance of Irvington, N. J., outlawed in the case of *Schneider* v. *State*, 308 U. S. 147.

[2] Since this Court, in *Jones* v. *Opelika*, supra, has said that it desires to know the income and disbursements from petitioners' activity it is necessary to go into a long detailed analysis of 108 pages of evidence in the record.

Each petitioner approached the homes of the people of Jeannette in an orderly and proper manner by knocking at the door or ringing the doorbell: When the householder or occupant arrived at the door the caller presented his 'testimony card', entire text of which appears in the Record at page 78a.

Each petitioner also offered to play (and did play when permitted) a record entitled "Snare and Racket", showing the clear distinction between "religion", which is demonism, and Christianity, which is the true worship of Almighty God. That phonograph record was reproduced in open court and appears transcribed in the record. R. 60a to 62a.

When the householder had fully considered the card or record the caller exhibited the literature, a book entitled "Salvation" and certain booklets. If the householder desired the literature he could immediately accept and keep it. If financially able and willing, he could at the same time contribute the sum of twenty-five cents to help print and distribute more like literature. If unable at the time to contribute any sum, he could nevertheless accept and retain the proffered literature, *gratis*, upon condition that he agree to study its contents with his Bible.

Contents of said literature related exclusively to a revelation of God-given prophecies of the Bible as such are being fulfilled in modern times, showing that this is the time of "the end" foretold in Holy Writ, as evidenced by the rapid advance of the Devil's dictator-totalitarian rule projected and pushed by a giant totalitarian religious organization which is bent on achieving *world domination* by destroying all democracy from off the earth and ruling the peoples of all nations with an iron hand; and that the people's only hope of escape from such scourge is "the battle of that great day of God Almighty" at Armageddon (Revelation 16: 13-16), now near; when JEHOVAH, the Almighty God, will completely destroy His and mankind's chief enemy, Satan, and also Satan's entire organization invisible and visible consisting of commercial, political and ecclesiastical elements, and

which destructive ACT OF GOD shall be immediately followed by continuing growth and irresistible expansion of His Theocratic Government which alone shall prevail eternally in all the universe, to bring peace, joy, prosperity, happiness and endless life to those on earth who survive that most terrible battle of all time, and eventually also to many who have died in centuries past and who shall by the power of the Creator be raised from the dead to live in perfection upon earth in obedience to the righteous laws of Jehovah's Government under His King Christ Jesus and God's resurrected "princes in all the earth".—Isaiah 32:1; Micah 5:4, 5; Psalm 45:16.

Upon any householder's indicating unwillingness to read the caller's card, listen to the phonograph or obtain the literature, the caller would quietly pass on to the next house.

The evidence failed to show, and it is not contended, that petitioners 'trespassed' or were in any case offensive or annoying in their method of presentation. They were quiet and courteous in their dealings with everyone whom they approached in Jeannette.

The undisputed evidence showed that the bound books entitled "Salvation" and "Creation" distributed by petitioners were published and distributed by the Watch Tower society for cost of 20 cents per volume to local organizations or congregations of part-time workers and ministers referred to in the testimony as "companies". (R. 101a-102a; 67a) That the local congregations or companies had expenses of maintaining a meeting hall or place of worship. That the society permits the local organization to make its own rules as to amount to be contributed by the local ministers engaged in such part-time work. That such *companies* whose members had been assigned the City of Jeannette as territory to preach in had established the rate of 25 cents per volume to be contributed by each member or minister for the literature which he distributed from house to house. (R. 83a; 93a; 101a-102a) That such assessed figure included a difference of 5c per volume to defray local meeting hall

expense (R. 87a) and did not permit the making of any profit whatsoever on the literature placed. (R. 101a) That the publisher or minister had to bear his own expense of travel to and from territory and cost of any books or literature placed with the people without contribution, which expense was not taken care of from money received from books placed but by money earned by the petitioners in their secular activity. Thus each petitioner operated at a loss. R. 64a; 66a.

The exception to the above arrangement was the petitioner Robert Lamborn, a resident of Cadiz, Ohio, and a member of the Cadiz congregation of Jehovah's witnesses, who was visiting in Jeannette and vicinity on the day in question. He obtained his literature from the Cadiz congregation. This congregation let the books to members of the congregation, ministers, for distribution from house to house on the basis of 20 cents per volume paid by each minister. He also paid three cents per volume for the booklet "Government and Peace" which he gave free of charge with every bound volume placed and to persons too poor to contribute. That he gave away many volumes of literature to persons who contributed no money. That on the whole he spent more money than he took in from the public and what he contributed to the work exceeded his expenses. In addition to this he has his expense of travel, etc., for which he receives no reimbursement. Lamborn is a farmer and earns his living from the soil. (R. 73a; 65a-76a) He did not make any profit from literature placed in Jeannette or elsewhere. R. 76a.

The other exception was petitioner Earl Singer, the only full-time publisher, "pioneer minister," who said that the *society* had made arrangements for full-time ministers to receive the books for five cents each (a discount of fifteen cents under cost of publication) or one-fourth of the cost price paid by the congregations to the society because they do not ordinarily have support from secular activity as does the part-time minister. This discount on each book was a

contribution from the society to aid the full-time publisher to defray expense of operation and to bear the expense of giving away literature free. In his own case, however, Singer testified that he made his living and obtained necessary financial support from money received from his trucking business which he owned and that he did not make any money whatsoever from his preaching activity from house to house because in the long run he gave away more literature free than what he distributed to those who contributed. That over a month's time his expense in preaching far exceeded the amount of money received from contributions. R. 100a-105a.

The case of Charles Seders is typical of all the *part-time* ministers, petitioners. He contributes 25c per book to his local congregation and distributes the books from house to house at the same contribution. During January, 1940, the month prior to the trial in the Mayor's Court he had distributed 37 bound books, receiving contributions only from persons who accepted half of that number. His secular occupation was as a tin mill worker. He preached from house to house on Sundays. R. 90a-96a.

While the testimony of the witnesses for the Commonwealth is that some of them "bought" literature from some of the petitioners for "25c" they uniformly admitted that what was actually said was "How much are they?" and were advised "25 cents per volume". (R. 44a-47a; 50a; 32a-34a) Some also testified that it was considered their duty to *buy* a book so as to enable the police to arrest petitioners. (R.40a-44a) (R. 32a-34a) Their conclusions or statements that they "bought" and that petitioners "sold" the literature do not change the real and true nature of the transactions and petitioners good work from charitable and benevolent activity to commercial business. So to permit would allow an unbeliever to go into the church building or synagogue and place a quarter in the contribution box or plate and later come into court and testify that he "bought" or "purchased" a sermon, in an effort to falsely label and convert the "church"

from a place of worship to a commercial store-house.

The undisputed evidence is, therefore, that six of the eight petitioners obtained the literature from their local congregations at 25 cents per volume and placed it with the public while preaching from house to house, receiving contribution in the same or less amount: therefore no "profit" was made on their transactions. That they gave away much literature free of charge. That two other petitioners obtained the literature at a cost less than offered to the public but that, due to expense and giving away more than half of the literature placed without receiving any contributions, they operated at a loss to themselves and preached without gain, profit or benefit to themselves. Therefore the conclusion of the Superior Court and the Mayor's Court that the activity was commercial is wholly without foundation in fact, reason or law.

The phonograph record "Snare and Racket" and the printed card used by petitioners to introduce the literature to the people do not support the conclusion or statement that there were any "sales" of literature in Jeannette on February 25, 1940, the date of petitioners' arrest. These instruments appear in the record at pages 60a-62a and 77a-78a.

8. *Special History of this Controversy.*

This particular ordinance has been the object of litigation in the courts, Federal and Commonwealth, for years, beginning in 1939 with the case of *Commonwealth* v. *Stewart*, 137 Pa. S. C. 445, 9 A. 2d 179. There the appeal was dismissed for technical reasons. Subsequently Stewart sought a writ of certiorari, by petition, from this Court to the Mayor's Court of Jeannette to review the judgment of conviction. Presumably the reason for this Court's denial of certiorari in 309 U. S. 674, 699 was that the case was disposed of on adequate non-federal grounds, that is to say, petitioner Stewart had not properly complied with recognized practice in the courts of Pennsylvania in taking his

appeal from the Mayor's Court to the Court of Quarter Sessions. Again in 1941 validity of this ordinance was questioned in *Ferree et al.* v. *Douglas, Keeper, etc.*, 21 A. 2d 472, where the Superior Court again refused to consider validity of the ordinance. On May 2, 1941, the United States District Court declared this ordinance unconstitutional as construed and applied to petitioners. *Douglas* v. *City of Jeannette et al.*, 39 F. Supp. 32. The City of Jeannette appealed the case to the United States Circuit Court of Appeals for the Third Circuit, and on August 31, 1942, that court reversed the judgment of the United States District Court, declaring that the writer of the opinion and another Circuit Judge agreed with the minority opinions of Chief Justice Stone and Justice Murphy in the case of *Jones* v. *Opelika*, supra, that the ordinance was unconstitutional but because forced to follow precedent they reluctantly reversed the District Court. See page 161 of the Record of No. 450, October Term 1942, on docket of this Court styled *Douglas et al.* v. *Jeannette et al.*, petition for writ of certiorari to review said judgment of said court.

B

Questions Presented

By reason of the foregoing, there were seasonably presented to the courts below and there are now presented to this Court for review substantial federal questions as follows:

(1) Is the ordinance in question unconstitutional on its face and as construed and applied because imposing a tax excessive, exorbitant and prohibitive in amount of $10 daily or $3,650[3] annually in one section, and in another section for

[3] The Superior Court does not mention the $10 daily tax imposed for "peddling and hawking" but does refer to the $1.50 tax on "canvassing for" and "soliciting" orders for future delivery. The complaint charged facts showing violation of both. The undisputed evidence shows that petitioners were not soliciting or canvassing for orders for future deliveries; therefore they were convicted for not having paid the $10 daily peddler's and hawker's license tax.

a daily tax of $1.50 or $547.50 annually, upon the constitutionally secured rights of freedom of press and of worship of Almighty God?

(2) Does the ordinance as construed and applied and on its face unduly abridge petitioners' rights of freedoms of speech, of press and of worship of Almighty God contrary to the First and Fourteenth Amendments to the United States Constitution?

(3) Does the ordinance as construed by the Superior Court violate the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution by reason of discrimination against petitioners by holding that persons who call *from house to house* are subject to its terms and at the same time excluding therefrom persons of the same class who "peddle", "canvass," "solicit" and "sell" *upon the public streets* of the city of Jeannette?*

C

Reasons Relied on for Allowance of Writs

The most grave and serious questions that can be presented to this Court are presented here, namely, whether or not this Court will permit to stand a judgment of a state court which approves of a revenue measure known as the license tax to be tied onto the unalienable rights of freedoms of speech, press and worship of Almighty God so as to abridge such rights contrary to the First and Fourteenth Amendments to the United States Constitution. The holding

* This question is presented here for the first time in this litigation. The question could not have been presented in the court below until after this distinction and discrimination were recognized by the Superior Court in its opinion. President Judge Keller says: "It has not been enforced so as to prevent appellants from freely selling, without license, their pamphlets and weekly publications on the streets (see Com. v. Reid, supra), but only as respects canvassing, soliciting and sales from door to door and house to house." Commonwealth v. Reid, 20 2d 841, 144 Pa. S. C. 569, makes the same discrimination with reference to a similar ordinance. It is therefore timely and proper to submit this question here for the first time inasmuch as this is the first opportunity for petitioners to make this claim in this litigation.

of the Superior Court is in conflict with applicable decisions of this Court involving this sort of ordinance. *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 55-57.

Although the decision of the Superior Court relies upon a decision (at this writing unsettled and not yet final) by a bare majority of one of this Court in *Jones* v. *Opelika*, supra, yet it wholly fails to give effect to the spirit of the applicable exception announced in that same *Opelika* case. The Superior Court overlooks the fact that the ordinance contains excessive daily license tax fees of $10 and $1.50 respectively. Here these tax sums are complained of as being excessive. Although not specifically complained of as excessive in the Superior Court, because it was not considered necessary *thus* to complain of the taxes, it was complained of as a burden which permits the further claim of excessiveness. Since the new requirement of having to attack the tax as excessive was announced for the first time in the *Jones* v. *Opelika* case *after* the submission of this case in the Superior Court, the petitioners are now properly making here in this Court, for the first time, their claim that they are excessive. See footnote 4, page 13, supra.

The manner in which the Superior Court construed the ordinance by voluntarily contributing the statement that license tax laws are not applicable to the "sale" of literature *upon the streets* while they can be constitutionally enforced as to "sale" of literature *from house to house*, gives rise to the presentation to this Court of another point which petitioners did not have the opportunity of raising in the Superior Court. See also *Commonwealth* v. *Reid*, 144 Pa. S. C. 569, 20 A. 2d 841, holding unconstitutional a license tax ordinance applied to "sale" of literature *on the streets* of Clearfield, and which opinion says that ordinances are properly applicable to regulate house-to-house "sale" of literature. Since this holding constitutes an illegal discrimination and was announced for the first time in this case by the Superior

Court, it is timely to complain of same here for the first time. See footnote 4, page 13, supra.

Furthermore the Superior Court committed grave error in applying the rule announced in *Jones* v. *Opelika*, supra, because the undisputed evidence shows that the activity of petitioners is not "commercial", that they made no profit, operated at a loss by giving away *free of charge* more literature than each distributed to persons who contributed, and that the activity constitutes petitioners' *way* of worship of Almighty God.

The holding in the case at bar is directly contrary to prior decisions of the Superior Court in *Commonwealth* v. *Reid*, supra, where the rule was announced that the "sale" of literature did not warrant the violation of the Constitution by application of the license tax law. The decision of the Superior Court also conflicts directly with the holding of highest courts of other states, that the Federal Constitution is violated by applying the license tax laws to activity of Jehovah's witnesses. *State* v. *Greaves*, 112 Vt. 222, 22 A. 2d 497; *McConkey* v. *City of Fredericksburg*, 179 Va. 556, 19 S. E. 2d 682; and *Blue Island* v. *Kozul*, 371 Ill. 511, 41 N. E. 2d 515.

The *Jones* v. *Opelika* case as decided June 8, 1942, is not controlling because there this Court calls the license taxes involved "fees" whereas here it is admitted that the ordinance is a "revenue raising tax" measure exclusively. Purdon Penn. Stat., Title 53, par. 2198-2601, specifically describes this sort of ordinance as follows: "License Taxes for Revenue Purposes." Among other things it says: "The *taxes* assessed under this section shall be in addition to all other taxes. . . ."

It cannot be said that the license tax here is a regulatory fee, for it is not such in name or operation.

As to the principles of "substantial clog"; "excessiveness" and discrimination, there are here presented substantial federal questions that have not heretofore been determined by this Court.

The questions presented are of nation-wide importance and vitally affect and concern fundamental rights of every inhabitant of the United States. The court below has decided a substantial and important federal question in a way which is in conflict with applicable decisions of this Court and has so greatly strayed from sound doctrine and the ordinary course of judicial proceedings under the Federal Constitution as to call for an exercise of this Court's power of review so as to correct and remedy the same.

It is submitted that this case is one calling for exercise of this Court's supervisory powers under Section 237 (b) of the Judicial Code [28 U. S. C. A. 344 (b)] and Rule 38, paragraph 5 (b), of the Rules of this Court.

WHEREFORE your petitioners pray that this Court issue eight writs of certiorari to the Superior Court of Pennsylvania, directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered 1 to 8, inclusive, April Term 1943, and that the decrees and judgments of the Superior Court affirming the judgments of the Quarter Sessions Court refusing appeals from the convictions by the Mayor's Court of the City of Jeannette be here set aside and reversed, and that your petitioners be granted such other and further relief in the premises as to this Court may seem just and proper under the extraordinary circumstances.

ROBERT MURDOCK, Jr.
ANNA PERISICH
WILLARD L. MOWDER
CHARLES SEDERS
ROBERT LAMBORN
ANTHONY MALTEZOS
ANASTASIA TZANES
ELLAINE TZANES

Petitioners

By
HAYDEN C. COVINGTON
Their Counsel of Record

SUPPORTING BRIEF

Assignment of Errors

The petitioners assign the following errors in the record and proceedings of said cause:

The Superior Court committed fundamental error in affirming the judgment of the trial court because

(1) The ordinance in question is unconstitutional on its face and as construed and applied because it imposes a revenue raising license tax that is excessive, exorbitant and prohibitive in amount of $10 daily or $3,650 annually in one section and in another section for tax of $1.50 daily, $7 weekly, upon constitutionally secured rights of freedom of press and of worship of Almighty God?

(2) The ordinance in question on its face and as construed and applied abridges petitioners' rights of freedoms of speech, of press and of worship of Almighty God contrary to the First and Fourteenth Amendments to the United States Constitution?

(3) The ordinance as construed by the court below so as to exclude from its terms persons who sell upon the streets and at the same time include within its terms the same class of persons who sell from house to house is unreasonable discrimination, thus violating the *due process* and *equal protection* clauses of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

For the purpose of saving time and space, reference is made to pages 14 to 34 of the petition for writ of certiorari and supporting brief in case No. 450 October Term 1942, styled *Douglas* v. *Jeannette*, for an extended discussion as to the validity of this ordinance.

A discussion of the reasons expressed by the Pennsylvania Superior Court in its opinion construing this ordinance in the case at bar is necessary. Such will throw light upon case No. 450, above referred to, and give the Court a broader view of the questions presented in both these cases.

The Superior Court has properly declared that an ordinance of this sort providing for payment of a license tax as a condition precedent to "sale" of literature *upon the streets* is unconstitutional and void. That court held that the constitutional guarantee of freedom of press was not confined to giving away literature *free of charge* but also extended to literature which was sold. The case referred to is *Commonwealth* v. *Reid et ux.*, 144 Pa. S. C. 569, 20 A. 2d 841, involving the activity of Jehovah's witnesses. There as well as in the case at bar it is said that when such activity is carried on from *house to house* the state may regulate, prohibit or impose a license tax revenue law upon one so exercising fundamental personal rights (from *house to house*). That court supports this conclusion upon its own prior decision in *Pittsburgh* v. *Ruffner*, 134 Pa. S. C. 192, 4 A. 2d 224, holding valid a vicious censorship-license-permit ordinance identical in terms with the Irvington (New Jersey) ordinance knocked down in *Schneider* v. *State*, 308 U. S. 147. Since this Court's decision in the *Schneider* case the Superior Court has consistently refused to admit that its holding in *Pittsburgh* v. *Ruffner*, supra, is repugnant to the *Schneider* case.

The practice of calling from house to house is not a crime, a nuisance, or a "business" which imperils the public interest. While it can be regulated as to reasonable times, it cannot be prohibited. If the house-to-house activity con-

sists of distributing or "selling" literature it cannot be taxed because it is a direct burden. In the *Schneider* case this Court held that the most appropriate way of distributing and circulating publications was from house to house. There the Court also held that reasons advanced to justify the regulation or burdening of other personal activity, such as selling ordinary articles of goods and merchandise, do not justify suppression or censorship of the exercise of rights vital to the maintenance of democratic institutions such as circulation or "sale" of literature.

While legislative judgment condemning, prohibiting, regulating and taxing certain occupations because of supposed public interest or evil tendencies cannot ordinarily be questioned under the 14th Amendment securing due process of law, yet such rule would not and can not obtain and prevail where the activity or occupation is one established or specifically protected against abridgment by the Constitution. Circulation and distribution of literature, either gratis or when simultaneously receiving money contributions, is among practices so protected. Consequently the conveniences of the housewife not being annoyed by calls or knowing the reputation of persons who call from house to house are not sufficient reasons to justify abridgment of the freedoms of press, speech and worship of Almighty God. *Schneider* v. *State*, supra.

The business or occupation of going from house to house selling merchandise is a lawful business and is not a public nuisance and therefore cannot be prohibited. The courts have uniformly so held. *Smith* v. *Texas*, 233 U. S. 630, 636.[*] Nor can a lawful business be subjected to unreasonable regulations under the *police power* having no reasonable relation to the safety, welfare and morals of the public. *State* v. *Paille*, 90 N. H. 347.

It is not contended that the ordinance here is a regulatory measure. The statute authorizing it is a revenue raising

[*] *City of Mt. Sterling* v. *Donaldson Baking Co.*, 287 Ky. 781, 155 S. W. 2d 237.

measure. The ordinance does not provide for time and place of peddling or selling. Once the license tax is paid and permit obtained one may go any place at any time within the city to "annoy" all whom he meets from house to house without being required to answer to the authorities under the ordinance.

The ordinance does not purport to deal with any abuse of privilege in the making of said house-to-house calls, nor does it purport to serve as a revenue measure for the sole purpose of providing additional police protection for the distributor or the public. It is a revenue measure exclusively, without any relation whatsoever to any regulatory or police powers of the city. *Blue Island* v. *Kozul*, 379 Ill. 511, 41 N. E. 2d 515; *State* v. *Greaves*, 112 Vt. 222, 22 A. 2d 497. If it be considered a regulatory law, it immediately becomes a *penalty* upon the exercise of a constitutional right. *Bailey* v. *Drexel*, 259 U. S. 20.

The opinion ignores entirely the claim that the ordinance is unconstitutional as construed and applied to the admitted exercise of constitutional rights and fails to weigh the substantiality of the reasons advanced in support of the law with the fundamental guarantees of freedom of press and of worship of Almighty God. Whether an ordinance is constitutional or unconstitutional depends on the facts to which it is applied. *Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535, 545. Here the undisputed evidence shows the exercise of fundamental rights of press activity and worship of Almighty God is involved. There does not appear to be any ground justifying an invasion of such rights; therefore, here *application* of the ordinance is unconstitutional.

The declared guaranties of freedoms of speech, press and worship of Almighty God are statements by the people of this nation speaking directly to those who govern, as well as to the governed. Those guaranties cannot be made to yield to the weaker, and at most indirect and oftentimes unauthorized, expression of the people through the legislature.

The burden is upon the Commonwealth to establish the

grounds or reasons for abridging here the freedoms of speech, press and worship. It has failed to discharge such burden; therefore, the license tax imposed here must fall as unconstitutional.

When considering the constitutional right of one to "sell" literature *on the streets* the Superior Court held that the fact that it is "sold" or is given away "free of charge" makes no difference; but, on the other hand, that court holds that "selling" literature *from house to house* makes applicable the peddler's and hawker's license-tax law in question. There does not appear to be any reason for this distinction, especially since the law is not regulatory in nature.

Petitioners' activity is charitable and benevolent. It is not contended that they held back the literature at any home for want of a money contribution. The evidence shows that they gave away *free of charge* as many pieces of literature to non-contributors as contributors of money had accepted from them, and that each petitioner operated at a financial loss. The evidence shows that petitioners contribute their own money earned from other sources to maintain themselves in doing this work. Contributions which petitioners accept from recipients of literature are not sufficient to maintain the work. There was no finding by the Superior Court nor by the Mayor's Court that the activity was commercial or that a profit was made. The entire case is based on the proposition that a "sale" was made, contrary to the terms of the ordinance, when contributions were accepted as the literature was distributed. This is not competent or sufficient.

The charitable nature of the activity is not changed by the fact that the one contributing the money *thought* he was "buying" a sermon, or *thought* that it was "sold" to him. An examination of the entire evidence shows that the activity is charitable and non-profit. Consequently if it is unconstitutional to require a license tax upon giving literature away free of charge it is equally void to require a tax on charitable activity of distributing literature.

The Superior Court stumbled in a consideration of the activity of petitioners. That court says that petitioners should limit their activity to assembly for worship in the homes or meeting places. In other words, that court deems petitioners' practice of preaching apostolically from *house to house* to be improper, *unreasonable*. Courts have no authority to hold that this *manner* of preaching is improper or unreasonable. If the practice does not violate the law of morals, invade the property rights of others, present a clear and present danger of breach of the peace, or actually cause such breach, it cannot be interfered with by the courts. To suffer any civil magistrate to determine what is and what is not proper worship of the Creator would be to rule out the *way* of preaching employed by Christ Jesus and His apostles. *Reynolds* v. *United States*, 98 U. S. 145, 162.

The proper attitude of the courts toward this fundamental liberty and its exercise under the Constitution was aptly expressed by Circuit Judge Parker speaking for a statutory three-judge district court in *Barnette et al.* v. *West Virginia State Board of Education* (D. C., S. D., W. Va.) October 6, 1942, when that high federal court refused to follow the *Gobitis* flag case and declared unconstitutional the flag-salute regulation as applied to Jehovah's witnesses in that state. In that case he says:

> "Courts may decide whether the public welfare is jeopardized by acts done or omitted because of religious belief; but they have nothing to do with determining the reasonableness of the belief. That is necessarily a matter of individual conscience. There is hardly a group of religious people to be found in the world who do not hold to beliefs and regard practices as important which seem utterly foolish and lacking in reason to others equally wise and religious; and for the courts to attempt to distinguish between religious beliefs or practices on the ground that they are reasonable or unreasonable would be for them to embark upon a hopeless

undertaking and one which would inevitably result in the end of religious liberty. There is not a religious persecution in history that was not justified in the eyes of those engaging in it on the ground that it was reasonable and right and that the persons whose practices were suppressed were guilty of stubborn folly hurtful to the general welfare. The fathers of this country were familiar with persecution of this character; and one of their chief purposes in leaving friends and kindred and settling here was to establish a nation in which every man might worship God in accordance with the dictates of his own conscience and without interference from those who might not agree with him. The religious freedom guaranteed by the 1st and 14th Amendments means that he shall have the right to do this, whether his belief is reasonable or not, without interference from anyone, so long as his action or refusal to act is not directly harmful to the society of which he forms a part."

The suggestion and argument contained in the majority opinion of this Court in the case of *Jones* v. *Opelika*, supra, that the courts are precluded by the action of local legislative authorities in deciding when rights of freedoms of press and worship must yield to the exercise of the police or taxing power, nullify entirely the guaranties contained in the 1st and 14th Amendments.

The Constitution is not worth the paper it is written on if no legislature (municipal and state) or police court were bound to respect it except in so far as it chimes with the policy such local governing factor might choose to follow. The Bill of Rights is not a mere guide for the exercise of legislative discretion, but is a part of the fundamental law of the land containing express restraints upon the governing power of the nation, states and municipalities.

With the advance of the totalitarian spirit in other parts of the world in recent years there has been a tendency in

republics and democracies to drift aimlessly away from the 'mooring cables' serving as checks and balances of such popular governments. In this America has been no exception. The forefathers who wrote the Constitution clearly intended and stated that its function was to secure "the blessings of liberty to ourselves *and our posterity*". This Court was established to keep the "ship of state" anchored in its proper position and to prevent encroachments upon the "blessings of liberty". It has thus served as a "keystone" of the government.

During the first sixty-eight years of this Court's existence it was not called upon to declare a law unconstitutional. This was because legislators and executives, faithful to their oaths of office, exercised only the power granted to them. Failure of legislators and executives to hold themselves in check has many times caused this Court rightly to exercise its kingly power of restraint granted under the Constitution.

Throughout the history of the Court there has been maintained the proper attitude of non-interference by government with private property rights, business and personal activity, except where absolutely necessary in the interest of public welfare under the *police power*. Until recently the attitude was always assumed that the *Government* was a means to an end, to wit, liberty and happiness of *the governed*. The end has never been *supremacy* of the state.

It is noticed that since 1935, especially with reference to private business and property rights, the policy has changed from *non-interference* by government to *regulation and control* by government. This may be necessary as a means of following the economic life of the nation and supplying its needs and is not questioned or debated here. We now find many ways of the economic life of the nation regulated, controlled under a centralization of power in government. While the needs may justify such a change in the economic affairs of life, there certainly is no showing or justification as to any need for a similar change with reference to the exer-

cise of fundamental *civil rights* of the inhabitants of the land. Any turns toward regulation of *civil rights* as are property rights must be *halted* now. Such fundamental personal rights, guaranteed as they are under the first amendment and secured from state invasion by the 14th Amendment, cannot be infringed by any law without amendment of the Constitution, except in cases where the conduct presents a clear and present danger which is immediate against the public peace of the state, the morals of the people, and their property rights, or advocates the overthrow of the government by force and violence. Even when dealing with such abuses the law employed must be directed at the abuse and a general law prohibiting the exercise of such rights cannot be enacted or applied.

Taxes imposed on the exercise of constitutional rights find no justification whatsoever in the Constitution, law or reason. We submit that in the *Jones* v. *Opelika* case this Court cut the 'anchoring cable' of the Constitution and is rapidly drifting from safe *waters of liberty* to tempestuous danger permitting standardless, indiscriminate and capricious regulation and control and ultimate absolute suppression of fundamental personal rights. The opinion by the Pennsylvania Superior Court in this case is further evidence of this Court's error in the *Jones* v. *Opelika* and companion cases. We refer to the dissenting opinions of Chief Justice Stone and Justice Murphy in those cases.

It is fitting to call to the attention of the Court an appropriate former expression, *Herndon* v. *Lowry*, 301 U. S. 242, where it is said:

> "The power of a state to abridge freedom of speech . . . [press and worship of Almighty God] is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a *reasonable apprehension of danger to organized government*. The *judgment of the legislature is not unfettered*. The limitation upon individual liberty *must*

have appropriate relation to the safety of the state." [Italics and bracketed words added]

The opinions of the Superior Court in the case at bar and in the case of *Commonwealth* v. *Reid*, supra, expressly hold that license-tax laws when applied to sale or circulation of literature upon the streets are unconstitutional; but that when applied to the same activity done from house to house they are constitutional. This distinction is without reason or justification and is unreasonable. It is directly repugnant to *Schneider* v. *State*, supra. The ordinance as construed by the court below discriminates unreasonably against petitioners who distribute literature from house to house. The holding of that court in this respect violates the due process and equal protection clauses of the Fourteenth Amendment. *State* v. *Paille*, 90 N. H. 347; *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494, 495; *Truax* v. *Corrigan*, 257 U. S. 312, 331-333; *Barbier* v. *Connolly*, 113 U. S. 27, 31-32; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 418; and *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 289. See also *Easton* v. *Easton Beef Co.*, 5 C. C. 68, 5 Lanc. 180, 1 North 125 (1888), and *Wagner* v. *Covington*, 251 U. S. 95, where the license-tax ordinance was found to discriminate in favor of intrastate as against interstate transactions.

The first time that this particular ordinance was judicially construed by a Pennsylvania court so as to exclude and exempt from its terms peddling, hawking and selling upon the streets, and that thus applied it would be unconstitutional, was when the Superior Court filed its opinion in this cause on July 23, 1942. No person and no court had contended that its application was thus limited or that discrimination of the sort was permitted. It is strange that the court would so hold in the face of the express provisions of Section II of the ordinance specifically prohibiting peddling without a license "upon the streets of said Borough by outcry or solicitation of the people upon the streets" (R. 8a, 20a). Since this new theory or construction was given the

ordinance for the first time by the Superior Court, petitioners are now warranted in urging for the first time that the ordinance as thus construed violates the equal protection and due process clauses of the Fourteenth Amendment. Under similar circumstances the late raising of a federal question was approved and permitted by this Court in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673.

The Superior Court says this is a revenue law and the state statutes[6] fix authority for passage of ordinances by Pennsylvania cities requiring "license taxes for revenue purposes".

Since the license tax here involved is described by statute and admitted by the respondent and the court below as being a "revenue raising" tax exclusively and not a regulatory fee for policing, etc., the Superior Court of Pennsylvania has blindly pushed the sacred and beloved constitutionally protected rights of freedom to worship Almighty God and freedom of the press into the pathway of the gigantic taxing machinery of the state, which machinery and its operation is beyond the control of the judiciary.[7] If the decision of the Superior Court is permitted to stand, then truly it can be said that the Constitution is not worth the paper it is written on and that a way has been discovered to circumvent and escape the injunctions contained in the Constitution against abridgment by the state or nation of constitutionally secured and guaranteed freedoms for which the forefathers fought and died.

We again call this Court's attention to the case of *Grosjean* v. *American Press Co.*, 297 U. S. 233, where a license tax imposed on newspapers "selling" advertising and oper-

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[6] Third Class City Act of June 23, 1931, P. L. 932, Art. XXVI, s. 2601 and amendments; Purdon Statutes, Title 53, ss. 2198-2601 cited by Judge Keller as authority for the ordinance in question.

[7] See *Veazie Bank* v. *Fenno*, 8 Wall. 533; *McCray* v. *United States*, 195 U. S. 27; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, and other cases holding that if it is constitutional to apply a tax in any amount, it is beyond the power of the courts to save the thing or person subject thereto because of its size, excessiveness or amount so as to prohibit.

ated by *commercial* concerns was declared void "because of its direct tendency to restrict circulation"—Chief Justice Hughes in the case of *Lovell* v. *Griffin*, 303 U. S. 444. In that case the opinion among other things says:

> "In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well known and odious methods.
>
> "This court had occasion in Near v. Minnesota, supra, . . . and the Court was careful not to limit the protection of the right to any particular way of abridging it. . . ."

It is to be noticed that in that case there was no requirement on the part of this Court as a condition to questioning the law that the newspapers engaging in commercial advertising under it should attack the tax as being excessive. While this Court could have decided that case on the grounds of discrimination, it did not do so but seized the real question in the case and disposed of the case on the ground that freedom of the press was abridged by the *license tax*.

The *Grosjean* case is directly in point with the case at bar and the conflict between it and the opinion of the Superior Court in this case is ground for granting the petition for writs of certiorari.

As additional ground for granting the writs we urge the direct conflict with the case of *Lovell* v. *Griffin*, supra. In that case the ordinance required a license for which no fee or tax must be paid. Here the license is required but before it can

be had one must pay the tax. He must pay tribute to Caesar or purchase privileges guaranteed by the Constitution without charge or price before he can operate or exercise them. This leaves the right to exercise such fundamental personal rights only to him who is wealthy and rich enough to buy his constitutional privileges or give all his literature away free of charge. The *license* feature in this case is also objectionable *in addition to the tax* and nullifies the ordinance under the *Lovell* case, supra. To say that the case at bar is distinguishable because of the adding of the tax to the license reminds us of this expression: "To give such magic to the word 'tax' would be to break down all constitutional limitation of powers of Congress [constitutional guarantees of personal freedoms] and completely wipe out the [people's liberty] sovereignty of the states."—Chief Justice Taft in *Bailey* v. *Drexel*, 259 U. S. 20. [Bracketed words added]

Conclusion

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under Section 237 (b) of the Judicial Code [28 U. S. C. A. 344 (b)] and Rule 38, paragraph 5 (b), of Rules of this Court. To that end this petition for writs of certiorari should be granted so as to correct the assigned errors committed by, and the judgments rendered by, the Superior Court of Pennsylvania and the Mayor's Court, against petitioners, which judgments should be reversed.

Respectfully submitted,

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